LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 21 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965
No. 686

MARTIN MELCHER and DORIS DAY MELCHER, JEROME B. ROSENTHAL and RUTH B. ROSENTHAL,

Petitioners,

vs.

ROBERT RIDDELL, District Director of Internal Revenue of Los Angeles, California.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JEROME B. ROSENTHAL,
HARLAND N. GREEN,
250 North Canon Drive,
Beverly Hills, Calif. 90210,
Counsel for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes, and Rules of Court involved	2
Statement of the case	2
Reasons for granting the writ	5
Appendix A	App. p. 1
Appendix B	App. p. 4
Appendix C	App. p. 7

TABLE OF AUTHORITIES CITED

Cases	Page
Lewis v. NLRB, 357 U.S. 10 (1958)	5
Louisville Builders Supply Co. v. Commissioner, 294 F. 2d 333 (6th Cir. 1961)	5
Statutes	
Internal Revenue Code of 1954, Sec. 7402	5
Internal Revenue Code of 1954, Sec. 7402(b)	5
Internal Revenue Code of 1954, Sec. 7441	4
Internal Revenue Code of 1954, Sec. 7453	5
Internal Revenue Code of 1954, Sec. 7456	5
Internal Revenue Code of 1954, Sec. 7456(a)	5
Internal Revenue Code of 1954, Sec. 7482(a)	6
United State Code, Title 28, Sec. 1254(1)	2
Rules of Court	
Federal Rules of Civil Procedure, Rule 45	5
Federal Rules of Civil Procedure, Rule 45(b)	5
United States Tax Court Rules, Rule 44	5

IN THE

Supreme Court of the United States

October Term, 1965
No. .....

MARTIN MELCHER and DORIS DAY MELCHER, JEROME B. ROSENTHAL and RUTH B. ROSENTHAL,

Petitioners,

vs.

ROBERT RIDDELL, District Director of Internal Revenue of Los Angeles, California.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on July 20, 1965.

Citations to Opinions Below.

The opinion of the District Court dismissing Petitioners' Application for Order for Enforcement of Subpoena Duces Tecum (App. B., *infra,* pp. 4-6) is reported at 234 F. Supp. 105 (1964).

The opinion of the Court of Appeals for the Ninth Circuit, printed in Appendix A hereto, *infra,* pp. 1-3, has not yet been reported.

Jurisdiction.

The Judgment of the Court of Appeals for the Ninth Circuit was entered on July 20, 1965. See Appendix A, p. 1, *infra.* Jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented.

1. Whether the Tax Court has the power to quash a Subpoena Duces Tecum issued at the request of taxpayer directed to the District Director of Internal Revenue.

2. Whether the Tax Court can deprive a District Court of its statutory jurisdiction to enforce, modify or quash subpoenas issued by the Tax Court.

3. Whether the Tax Court can effectively deprive a taxpayer of a judicial hearing on the issue of taxpayer's right to know the contents of Internal Revenue documents and his right to have the documents present at the trial of his Tax Court case.

Statutes Involved.

The Statutes and Rule of Court involved are set forth below (Appendix C, *infra,* pp. 7-9).

Statement of the Case.

As a result of disallowance by the Commissioner of Internal Revenue of certain deductions taken by Petitioners in their tax returns and the resultant proposed determination of deficiencies of Federal Income Taxes, Petitioners filed petitions in the United States Tax Court for a redetermination of the proposed deficiencies.

These cases are now pending in the Tax Court of the United States.

On June 20, 1963, the Tax Court at the request of Petitioners issued its *subpoena duces tecum* to Robert Riddell, District Director of Internal Revenue of Los Angeles, directing him to bring certain documents within his possession as District Director of Internal Revenue of Los Angeles, to a designated place of hearing before the Tax Court.

The respondent in the Tax Court, the Commissioner of Internal Revenue, moved in the Tax Court to quash the *subpoenas duces tecum* which were issued by the Tax Court and served on Robert Riddell. On June 28, 1963, the Tax Court granted the Commissioner's motion to quash the *subpoenas duces tecum.* The Tax Court granted Petitioner's motion for continuance of the Tax Court controversy in order to allow Petitioners to bring the instant matter before the District Court of the United States. Robert Riddell has not produced any of the documents requested by the *subpoenas duces tecum.*

On July 22, 1963, Petitioners filed Complaints and Applications for Order for Enforcement of Subpoena Duces Tecum in the United States District Court for the Southern District of California, Central Division. In said Complaints, the Petitioners sought, *inter alia,* that the United States District Court issue an order requiring the defendant, Robert Riddell, to appear before the Tax Court of the United States and there to produce the documents described in the *subpoena duces*

tecum. The Petitioners also requested the United States District Court to modify the *subpoenas duces tecum* should the Court find them too broad, and to issue an order enforcing the *subpoenas duces tecum* as so modified.

On July 10, 1964, the District Court entered its orders dismissing the Petitioners' Complaints with prejudice for lack of jurisdiction over the subject matter and failure to state a claim upon which relief could be granted. The basis of the District Court's decision was that the Tax Court had the power to quash the *subpoenas duces tecum* and therefore there was no outstanding subpoena upon which the court could have acted.

The Petitioners appealed from the decision of the District Court dismissing the Complaint to the United States Court of Appeals for the Ninth Circuit. On July 20, 1965, the Court of Appeals for the Ninth Circuit affirmed the District Court's dismissal holding that the Tax Court has jurisdiction to quash *subpoenas duces tecum.*

The Tax Court is an independent agency in the Executive Branch of Government. Int. Rev. Code of 1954, §7441. Its sole function is to review determinations of Federal Tax deficiencies made by the Commissioner of Internal Revenue. The Commissioner of Internal Revenue is appointed by the President, and has such duties and powers as are prescribed by the Secretary of the Treasury. Therefore, both the Tax Court and the Commissioner of Internal Revenue are part of the Executive Branch of Government.

Reasons for Granting the Writ.

The basic question presented is whether the Tax Court has jurisdiction to make what is in effect a final determination on the question of whether a taxpayer can subpoena Internal Revenue documents.

Although the instant case is one of first impression, the issues involved are substantial and important. They are of importance to the administration of Sections 7402, 7453 and 7456, of the Internal Revenue Code of 1954, which Sections involve the general administration of the statutory scheme which Congress has provided for the issuance and enforcement of Tax Court subpoenas.

It is settled that the Tax Court's powers must be limited to those given to it by a specific Act of Congress, by its own rules adopted pursuant to congressional authority, and those powers inherent in a *quasi*-judicial body. *Louisville Builders Supply Co. v. Commissioner,* 294 F. 2d 333 (6th Cir. 1961). Where authority to quash subpoenas exists in our Federal Courts and agencies, it is specifically provided by rule or statute. *Lewis v. NLRB,* 357 U.S. 10 (1958); Fed. R. Civ. P. 45(b). The statutory grant of authority to the Tax Court to issue subpoenas does not include the authority to quash. Int. Rev. Code of 1954, §7456(a). Nor has the Tax Court attempted to prescribe a rule of practice or procedure by which it may quash subpoenas. Tax Court Rule 44. In the absence of a statute providing that the Tax Court may quash a subpoena issued in this proceeding, the Tax Court has no authority to do so. The assumption of jurisdiction by the Tax Court in this case violated a basic principle of the American Sys-

tem of Jurisprudence: that jurisdiction of the subject matter is conferred upon a court by the legislature and cannot be created by the action of the court itself.

The Tax Court of the United States was established to provide for an independent determination by an agency of the Executive Branch of Government of the issues involved in controversies between taxpayers and the Internal Revenue Service. Congress, consistent with the checks and balances system of our Government, and for the purpose of adequately controlling the executive agencies which are responsible for the administration of our tax system, provided for judicial review of Tax Court decisions by Courts of Appeal. Int. Rev. Code of 1954, §7482(a).

However, Petitioners respectfully submit that the normal course of judicial review of Tax Court decisions does not as a practical matter effectively protect taxpayers when the Tax Court quashes a subpoena.

It is true, as suggested by the Court of Appeals for the Ninth Circuit in the instant case, that the argument of error in quashing the subpoena could be made on appeal of an adverse decision on the merits of the Tax Court case. (App. A, p. 3.)

However, where the action of the Tax Court prevented complete discovery—*i.e.,* prevented the party wishing the subpoena from even learning the contents of the Government documents he sought—it would be almost impossible to effectively argue on appeal that the

Tax Court's action in quashing the subpoena was "clearly erroneous" so as to require a completely new trial. (Yet the order quashing the subpoena is not an appealable order.)

It is submitted that Congress foresaw this very breach of the checks and balances principle and for that reason created the statutory procedure whereby the District Court—a true member of the judicial branch of the Government—was given sole authority to enforce, modify or quash Tax Court subpoenas.

It is submitted that Congress did not intend that an administrative agency have final practical decision power as to whether or not a taxpayer has access to certain Internal Revenue documents, the contents of which may be necessary for the taxpayer to fairly present his case. Congress had the foresight to give the power to an independent judicial body—the United States District Court —and the Tax Court cannot thwart the congressional intent and take jurisdiction away from the District Court.

It is further submitted that the action of the Tax Court in quashing the subpoena was completely contrary to the established modern policy in our Federal Judicial System of complete discovery by both sides to a litigation so as to have all the facts available to the parties and to the trier of fact.

The issue present in the instant case is one that could recur in every matter before the Tax Court. It is therefore essential that this Court clarify this dispute

between legislative intent and a Tax Court practice which violates the basic checks and balances principle of our Government.

Conclusion.

For the foregoing reasons, this petition should be granted.

October 12, 1965.

Respectfully submitted,

JEROME B. ROSENTHAL,
HARLAND N. GREEN,
Counsel for Petitioners.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Martin Melcher and Doris Day Melcher, Jerome B. Rosenthal and Ruth B. Rosenthal, Appellants, v. Robert Riddell, District Director of Internal Revenue, etc., et al., Appellees. Nos. 19,694, 19,695.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

Decided July 20, 1965

Harland N. Green, Michael E. Schwartz, Rosenthal, Cook & Green, Cohen & Bricker, Kaplan, Livingston, Goodwin & Berkowitz, Samuel P. Norton, all of Beverly Hills, Calif., Attys. for Appellants.

Louis F. Oberdorfer, Asst. Atty. Gen., Lee A. Jackson, Harold C. Wilkenfeld, Jonathan S. Cohen, Harry Marselli, all Attys. with Dept. of Justice, Wash., D. C., Manuel L. Real, U. S. Atty., Loyal E. Keir, Asst. U. S. Atty., Chief, Tax Div., Los Angeles, Calif. for Appellees.

Before Chambers and Browning. Circuit Judges, and Tavares, District Judge.

Chambers, Circuit Judge:

May the tax court, for a case pending before it, permit the issuance of subpoenas duces tecum (with the body of the subpoena in blank) to be completed by counsel and then, after it finds out what text counsel has put in it, cancel the subpoena?

On the facts of this case, we hold the tax court may do just that.

The appellants have cases with a common issue pending in the tax court. They obtained the blank subpoenas from the tax court[1] and filled them out to name the district director of Internal Revenue at Los Angeles as the witness and commanded him to produce reports, memoranda and other office documents showing how the director internally had handled cases similar to those of these appellants. The director moved to quash, and a tax court judge granted the motion.

Of course, by statute the power to enforce subpoenas of the tax court is placed with the district courts.[2] The tax court adjudicates, but it has no contempt powers and no long arm of enforcement (the marshal). Conceiving that in issuing the subpoena the tax court had spent its authority, appellants filed a petition in the district court to enforce the subpoenas as completed by them. The district court dismissed, ruling it was without jurisdiction. We assume the ruling meant "no proper jurisdiction" rather than "no power to act."

The tax court, for reasons of convenience has provided for subpoenas in blank,[3] obviously to relieve administrative burdens of testing each one in advance. And, generally, little trouble results from letting the lawyers complete them.

Obviously the tax court could test subpoenas before issuance. Such is equivalent to imposing conditions on their issuance. We see little difference in letting sub-

---

[1]Section 7456, Internal Revenue Act of 1954.
[2]Section 7402, idem.
[3]Rule 44, Rules of Practice of theTax Court.

poenas go out wthout restriction and then testing after issuance; that is, on a principle of condition subsequent.

Surely the tax court has some authority by virtue of being a court. It can tell a lawyer to sit down, although it has to get help to punish for contempt. We think it must have a right also to say what is its own act, whether it handles the proposition by condition before issuance or after issuance. Appellants' position would deny the tax court even an orderly house, on the theory that the Congress in giving the enforcement power to the district court bumbled into such a thing as is presented here. We do not think Congress ever intended to do such a thing.

If the tax court's ruling was wrong, in due time it can be corrected here on review of the case.

The judgments of dismissal are affirmed.

APPENDIX B.

The Decisions Below.

Opinion of the U.S. District Court for the Southern District of California.

Martin Melcher and Doris Day Melcher, Jerome B. Rosenthal and Ruth B. Rosenthal, Plaintiffs, v. Robert Riddell, District Director of Internal Revenue at Los Angeles, California, Defendant. Nos. 63-856, 63-857. Decided: July 9, 1964

Francis C. Whelan, U. S. Atty., Loyal E. Keir, Asst. U. S. Atty., Chief, Tax Section, Thomas H. Mc Peters, Asst. U. S. Atty., Los Angeles, Cal., for Robert A. Riddle, District Director of Internal Revenue, Los Angeles District.

Rosenthal, Cook & Green, Beverly Hills, Cal., Harland N. Green, Beverly Hills, Cal., for Albert Gordon MacRae et ux., Martin Melcher et ux., and Jerome B. Rosenthal et ux.

Albert Lee Stephens, Jr., District Judge.

On July 22, 1963, plaintiffs filed a Complaint and Application for Order of Enforcement of Subpoena Duces Tecum pursuant to Section 7402(b) of the Internal Revenue Code [26 U.S.C. § 7402 (b)]. The Complaint asks the Court to issue an order requiring defendant Robert Riddle, District Director of Internal Revenue at Los Angeles, to appear before the Tax Court of the United States in a proceeding brought by the plaintiffs for a redetermination of alleged deficiencies in federal income tax owed by them and to there produce the documents and records described in a subpoena duces tecum duly issued by the Tax Court.

The Tax Court sustained a motion made by defendant to quash the subpoena in question. Plaintiffs contend that the Tax Court does not have the power to quash subpoenas and in so doing deprive this Court of its jurisdiction to enforce subpoenas issued by the Tax Court.

The defendant has moved to dismiss this action on two grounds:

(1) This Court lacks jurisdiction over the subject matter of the action;

(2) The complaint fails to state a claim upon which relief can be granted. The defendant's motion is premised upon the argument that the Tax Court is empowered to quash a subpoena issued in its own proceeding and, therefore, there is no outstanding subpoena upon which this Court can act.

The Court concludes that the Tax Court has the right to quash subpoenas issued in its own proceeding upon the objection made by the party served that the subpoena reaches documents which are not necessary or appropriate items of discovery.

It is true as plaintiffs argue that Rule 44 of the Tax Court Rules of Practice provide for the automatic issuance of a subpoena in blank upon the request by a proper party. This procedure parallels the practice of this Court. If the party served has objections to the subpoena thus issued, he can refuse to obey the subpoena in which case a proceeding to enforce the subpoena can be brought in this Court or he can present his objection to the Court issuing the subpoena. The Tax Court is in a better position to determine necessity and propriety of the subpoena issued by it in its pro-

ceeding and if quashing the subpoena is error, its determination is subject to review by the United States Court of Appeals.

Since this Court decides that the Tax Court has the power to quash subpoenas issued in its own proceedings, and the Tax Court has quashed the subpoena in question, there is no subpoena upon which this Court can act. Accordingly, the Motion to Dismiss is well taken and the cause must be dismissed with prejudice. F.R. Civ.P,, Rule 12(b) (1) and (6).

It is hereby ordered that the cause be dismissed with prejudice for lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted.

APPENDIX C.

Statutory Provisions Cited and Quoted.

Internal Revenue Code of 1954

Section 7402(b), Jurisdiction of District Courts

(b) To enforce summons.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

Section 7441. Status

The Board of Tax Appeals shall be continued as an independent agency in the Executive Branch of the Government, and shall be known as the Tax Court of the United States. The members thereof shall be known as the chief judge and the judges of the Tax Court.

Section 7453. Rules of practice, procedure, and evidence

The proceedings of the Tax Court and its divisions shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe and in accordance with the rules of evidence applicable in trials without a jury in the United States District Court of the District of Columbia.

Section 7456. Administration of oaths and procurement of testimony

(a) In general.—For the efficient adminstration of the functions vested in the Tax Court or any division thereof, any judge of the Tax Court, the clerk of the court or his deputies, as such, or any other employee of the Tax Court designated in writing for the purpose by the chief judge, may administer oaths, and any judge of the Tax Court may examine witnesses and require, by subpoena ordered by the Tax Court or any division thereof and signed by the judge (or by the clerk of the Tax Court or by any other employee of the Tax Court when acting as deputy clerk)—

(1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing, . . .

Section 7482. Courts of review

(a) Jurisdiction.—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

Tax Court Rules:

Rule 44. Subpoenas

(a) How issued. Subpoenas shall be issued to a proper party, upon request, and when issued shall be signed and sealed, but may otherwise be in blank. Subpoenas so issued in blank shall be completed before service by the party receiving them."

"Federal Rules of Civil Procedure (United States Code Title 28):

Rule 45. Subpoena

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things."

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 686

MARTIN MELCHER AND DORIS DAY MELCHER, JEROME B. ROSENTHAL AND RUTH B. ROSENTHAL, PETITIONERS

v.

ROBERT RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE OF LOS ANGELES, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Upon motion of the District Director, the Tax Court of the United States quashed subpoenas *duces tecum* which it had previously issued in blank to the taxpayers' counsel and which had later been served on the District Director.[1] The taxpayers then brought

[1] The subpoenas sought to obtain Revenue agents' reports, memoranda, and other government documents relating to the tax treatment of individuals other than the taxpayers, with these other individuals' names deleted. The subpoenas did not allege that the documents were in the District Director's possession. The District Director based his motion to quash on the grounds that the subpoenas were far too broad, both

796-685—65

this proceeding in the district court under Section 7402(b) of the Internal Revenue Code of 1954 to compel compliance with the subpoenas. The district court, upon motion of the District Director, dismissed taxpayers' action (Pet. App. B, pp. 5–6), and the court of appeals affirmed (Pet. App. A, p. 3).

The decision below is clearly correct and there is no conflict between circuits. Accordingly, further review is not warranted.

Petitioners contend that the Tax Court has no power to quash its own subpoenas once they have been issued. But an independent administrative tribunal like the Tax Court (see 26 U.S.C. 7441), which has been given express power to compel the production of evidence by subpoena (26 U.S.C. 7456(a)(1)), is not required mechanically to issue any subpoena requested by a party, but has discretion to deny the party's application because the subpoena is overbroad or otherwise improper, or to impose reasonable conditions upon its issuance. *E.g., E. B. Muller & Co.* v. *Federal Trade Commission,* 142 F. 2d 511, 520 (C.A. 6). Equally it can—as is the practice of the Tax Court (Tax Court Rule 44(a))—issue a subpoena to the requesting party in blank, the subpoena to be completed by the party before service. Such a practice is clearly justified by considerations of adminis-

---

geographically and in terms of the material sought, that they failed to describe adequately what the materials sought were, that they sought materials which could not be made public under Sections 6103 and 7213 of the 1954 Code and 18 U.S.C. 1905, and that the materials sought were in any event irrelevant and immaterial to the taxpayers' litigation in the Tax Court.

trative convenience, and, where such practice is followed, obviously the Tax Court must determine the reasonableness of the subpoena upon objection of the subpoenaed party. If it refused to entertain such objections, it would be abdicating all effective control over the issuance of subpoenas. Since the Tax Court was thus acting fully within its power in quashing the subpoenas procured by petitioners, their action under 26 U.S.C. 7402(b) to "enforce" the subpoenas was properly dismissed; as a result of the Tax Court's quashing order, there were no longer any subpoenas to enforce. Petitioners, of course, have a right to judicial review of the Tax Court's order. That right, however, is not exercisable in a § 7402(b) enforcement action, but only in an appeal to the court of appeals from the Tax Court's final decision.

For the foregoing reasons, the petition for a writ of certiorari should be denied.[2]

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD M. ROBERTS,
Acting Assistant Attorney General.

HAROLD C. WILKENFELD,
JONATHAN S. COHEN,
Attorneys.

DECEMBER 1965.

---

[2] The petition for a writ of certiorari was received by the Court on October 18, 1965, the last day for filing such petition. The certified copy of the record, however, was filed on October 21, 1965, albeit through no fault of petitioners. The petition, therefore, would appear to be untimely. Rule 22(3), Sup. Ct. Rules.

U.S. GOVERNMENT PRINTING OFFICE: 1965